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No. 80-1180

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. MCCALL, SR., ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior properly rejected petitioners' patent applications for portions of three sand and gravel mining claims because the rejected portions were nonmineral in character.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 628 F. 2d 1185. The district court did not issue an opinion. The opinion of the Interior Board of Land Appeals (Pet. App. A-21 to A-40) is reported at 7 I.B.L.A. 21.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1980 (Pet. App. A-1). The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. A-10 to A-11) was entered on October 17, 1980. The petition for a writ of certiorari was filed on January 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The suit arose from the Secretary of the Interior's rejection of petitioners' patent applications for certain portions of three sand and gravel claims on the ground that the rejected portions of the claims were nonmineral in character. The relevant facts may be summarized as follows:

In 1948, petitioners' predecessors in interest located 27 sand and gravel claims, of 80 acres each, on the public lands approximately five miles from downtown Las Vegas, Nevada. Subsequently, the petitioners filed patent applications seeking to obtain title to the claims. The Secretary of the Interior, acting through the Bureau of Land Management ("BLM") determined, *inter alia*, that petitioners were entitled to a patent for certain portions of claims Las Vegas Nos. 1, 2, 7, 18, and 27, but that other portions of those claims were not mineral in character and, thus, could not be patented to petitioners.[1] Consequently, BLM filed a contest

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[1]The Secretary also determined, in a separate proceeding, that petitioners had failed to make a discovery on 21 other claims in the Las Vegas group and invalidated those 21 claims. Those 21 claims are the subject of a separate petition in No. 80-1181.

complaint, alleging that the remaining unpatented land on the five claims was nonmineral in character[2] (Pet. App. A-41 to A-43).

An administrative hearing was conducted in 1969 before an administrative law judge (ALJ) at which petitioners and the government presented testimony and other evidence. Following the hearing, the ALJ entered a decision dismissing the patent application as to all challenged portions of the five claims (Pet. App. A-41 to A-53).

The petitioners perfected an administrative appeal to the Interior Board of Land Appeals (IBLA) which affirmed in part and reversed in part (Pet. App. A-21 to A-40). 7 I.B.L.A. 21 (1972). Reviewing the record, the IBLA found there was insufficient evidence to support the ALJ's determination that the unpatented portions of claims Las Vegas Nos. 1 and 2 significantly differed from the patented portions. Accordingly, the IBLA determined that the petitioners were entitled to a patent for the entire 80 acres of each of those claims (Pet. App. A-36 to A-37). The IBLA found, however, that the evidence showed that the challenged portions of claims Las Vegas Nos. 7, 18, and 27 were capped at the surface by a cemented layer of caliche which made extraction of the sand and gravel economically infeasible (Pet. App. A-37 to A-39). The IBLA accordingly upheld the ALJ's decision as to the disputed 140 acres on those three claims.

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[2]The particular acreage being contested on each claim at issue was as follows (Pet. App. A-43):

Las Vegas No. 1 — 10 acres
Las Vegas No. 2 — 20 acres
Las Vegas No. 7 — 40 acres
Las Vegas No. 18 — 30 acres
Las Vegas No. 27 — 70 acres

In 1976, more than 4 years after the IBLA had entered its decision, the petitioners filed a complaint in the district court alleging that the Secretary had acted arbitrarily and capriciously in rejecting their patent application with respect to the 140 acres. The Secretary filed a motion for summary judgment, based on the administrative record. Petitioners opposed the motion, contending, first, that the "10-acre rule," by which the Secretary analyzes the mineral character of a placer claim by 10-acre tracts within the claim, was erroneous, and, second, that the Secretary had improperly applied the rule by requiring petitioners to show actual sales of sand and gravel from each 10-acre tract to establish marketability. The matter was referred to a magistrate who recommended that the determination of the Secretary be sustained (Pet. App. A-12 to A-19). The district court, after considering petitioners' objections to the magistrate's recommendations, entered judgment in favor of the Secretary (Pet. App. A-19 to A-20). The court of appeals affirmed (Pet. App. A-1 to A-9).

ARGUMENT

This case presents no issue warranting review by this Court. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Section 1 of the general mining law (the Act of May 10, 1872, ch. 152, 17 Stat. 91), 30 U.S.C. 22, provides that "* * * all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase * * *." Thus, an individual may claim for himself such valuable minerals as he may discover on the public lands and he may obtain a patent to the lands on which the valuable minerals occur. In the case of a placer location, such as the claims at issue, an individual may

claim up to 20 acres for a single claim, while an association or group may claim 20 acres for each individual claimant, up to a maximum claim of 160 acres (30 U.S.C. 35, 36).

As the sole purpose of the mining laws is to encourage actual mineral development, *United States* v. *Coleman*, 390 U.S. 599, 602 (1968), a mining claim, to be valid, must strictly comply with the requirements of the mining laws. A basic requirement of the mining laws is that the claimant must make a "discovery" of a "valuable mineral deposit" within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295-296 (1920). To show a discovery, a claimant must physically expose a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a mine. Stated differently, a claimant must show that the minerals which he has uncovered can be extracted, removed and marketed at a profit. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.4 (1978); *United States* v. *Coleman, supra*, 390 U.S. at 602; *Chrisman* v. *Miller*, 197 U.S. 313, 321-323 (1905).

A second independent requirement of the mining laws is that the lands upon which a mining claim is located must be "mineral in character." *Cameron* v. *United States*, 252 U.S. 450, 456, 464 (1920). In applying this requirement, the Secretary has, for at least 70 years, employed a standard, known as the "10-acre rule," by which a claimant must show, if challenged, that each 10-acre subdivision of his placer mining claim is "mineral in character." *American Smelting & Refining Co.*, 39 Pub. Lands Dec. 299 (1910); *United States* v. *Bunkowski*, 79 Interior Dec. 43, 54-55 (1972); *United States* v. *Meyers*, 17 I.B.L.A. 313, 316-317 (1974). Land is "mineral in character" when known conditions reasonably engender the belief that the land contains

minerals of such quality and quantity as to render its extraction profitable and to justify expenditures to that end.[3] *Diamond Coal & Coke Co.* v. *United States*, 233 U.S. 236, 240 (1914). The "mineral in character" criterion differs from the discovery requirement in that a claimant need not actually physically expose a mineral deposit; the mineral character of the contested portions of the claim may be established by geological inference or by less definitive physical evidence. *Laden* v. *Andrus*, 595 F. 2d 482, 487-488 (9th Cir. 1979); *California* v. *E.O. Rodeffer*, 75 Interior Dec. 176, 180-181 (1968). Since the mining laws provide that placer entries should conform as nearly as practicable to surveyed subdivisions and contemplate that a placer location may be made of 10-acre tract, see 30 U.S.C. 35, 36, the 10-acre subdivision is used as the unit for determining mineral character. *American Smelting & Refining Co., supra*, 39 Pub. Lands Dec. at 301.

2. Petitioners contend (Pet. 18-27) that the "10-acre rule" is an unwarranted extension of the discovery requirements of the mining laws. As the court of appeals noted (Pet. App. A-3), however, petitioners failed to raise this issue in their objections to the proposed findings and recommendations of the magistrate or in their opening brief in the court of appeals. The court of appeals properly ruled that petitioners' failure to preserve the issue was a sufficient ground for affirming the Secretary's determination on this question. 28 U.S.C. 636(b)(1); *United States* v. *Walters*, No. 78-3653

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[3]Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, withdrew common varieties of sand, gravel and other similar materials from further location under the mining laws. *Coleman, supra*, 390 U.S. at 603-605. Consequently, claimants, such as petitioners, who have located common varieties of sand and gravel prior to the effective date of the Act, must show that the lands in question were mineral in character as of July 23, 1955. *Cameron* v. *United States*, 252 U.S. 450, 456 (1920); *Hallenbeck* v. *Kleppe*, 590 F. 2d 852, 856 (10th Cir. 1979); *Melluzzo* v. *Morton*, 534 F. 2d 860, 862 (9th Cir. 1976).

(6th Cir. Jan. 20, 1981), slip op. 3-6; *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442, 459 n.34 (7th Cir. 1975); *Mississippi River Corp.* v. *FTC*, 454 F. 2d 1083, 1093 (8th Cir. 1972).

3. The court of appeals held, in the alternative, that the "10-acre rule" was valid and had been properly applied by the Secretary here (Pet. App. A-3 to A-9). This determination was also correct. As already noted, Section 1 of the general mining law, 30 U.S.C. 22, provides that "* * * all valuable mineral deposits * * * shall be free and open to exploration and purchase, and *the lands in which they are found* to occupation and purchase * * *" (emphasis added). Private acquisition of interests in the public lands for purposes other than actual mining is not authorized by the general mining law. *Coleman, supra*, 390 U.S. at 602. It follows that the mining laws may not be used as a vehicle for obtaining title to public land which does not contain marketable minerals. As the Secretary stated in *Ferrell* v. *Hoge*, 29 Pub. Lands Dec. 12, 15 (1899):

> Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

Petitioners assert (Pet. 18-19) that the "10-acre rule" contravenes the established principle that only one discovery need be made for a single valid claim. However, as the court of appeals correctly pointed out (Pet. App. A-5), the "10-acre rule" does not require more than one discovery per claim, as proof of discovery requires a showing of an exposed mineral deposit on the claim while the fact that lands are "mineral in character" may be established by geological inference and with the existence of a market.

Similarly, as the court of appeals also correctly observed (Pet. App. A-5 to A-7), the "10-acre rule" does not require a claimant to show that he actually sold materials from the contested portions of the claims. Here, the Secretary did not base his determination simply on the ground that petitioners had failed to show any actual sales of materials from the contested portions of the claims; rather, the Secretary's decision was based on the fact that the caliche capping on those portions increased extraction and processing costs to the point that exploitation was economically infeasible (Pet. App. A-38 to A-39). Indeed, the IBLA expressly noted that a claimant need not show actual sales (*id.* at A-31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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